

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
PEDRO CRUZ,
:
Petitioner,
:
-against-
:
ROBERT ERCOLE,
:
Respondent.
-----X

07 Civ. 9868 (RJH) (DF)

ORDER

DEBRA FREEMAN, United States Magistrate Judge:

On December 8, 2009, Petitioner moved to stay these habeas proceedings, so as to allow him to exhaust his state remedies with respect to an additional claim, not yet pleaded here. (*See* Letter to Court, from Petitioner, dated Dec. 8, 2009 (Dkt. 10).) By Report and Recommendation of today's date, however, this Court has recommended the dismissal of all three of the claims that Petitioner has so far pleaded in this action. Petitioner has made no showing that his unpleaded claim would likely be of merit. Nor could he, as he asserts that this claim is based on "newly discovered evidence," but it appears from Petitioner's motion papers that he is not even in possession of this evidence; he has merely submitted a F.O.I.L. request to the trial court seeking its disclosure. (*See id.*)

Based on the reasoning of this Court's Report and Recommendation of today's date, together with the fact that Petitioner has not made any showing that his additional claim will have merit, Petitioner's motion for a stay is hereby denied. *See Rhines v. Weber*, 544 U.S. 269, 277 (2005) (holding that, while a district court has the discretion to institute a "stay and abeyance" of a federal habeas petition when it determines that there was "good cause" for the defendant's failure to exhaust his claims, it would be an abuse of discretion for a district court to

grant a stay where the unexhausted claims are “plainly meritless”); *see also* *Thristino v. U.S.*, 379 F. Supp. 2d 510, 519 (S.D.N.Y. 2005) (noting that *Rhines* does not mandate that a district court automatically grant stay and abeyance, but is instead a “case-specific inquiry within the discretion of the district court”).

Dated: New York, New York
January 20, 2010

Respectfully submitted,


DEBRA FREEMAN
United States Magistrate Judge

Copies to:

The Honorable Richard J. Holwell, U.S.D.J.

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